MAIMUNAH BTE MEGAT MONTAK

v.

MAYBAN FINANCE BERHAD

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATUK WIRA WAN YAHYA PAWAN TEH FCJ
DATO' ABU MANSOR ALI JCA
[CIVIL APPEAL NO: 02-471-93]
3 JULY 1996

LAND LAW: *Charge - Order for sale of charged land - Order omitted to state date of auction and amount due - Non-compliance of s. 257(1)(b) & (c) National Land Code, 1965 - Effect - Whether order rendered invalid - Consideration of O. 83 r. 3 Rules of the High Court 1980.*

The chargee in this case had applied for an order for sale of the charged land to satisfy the amount due and owing under the charge. Following that the High Court made an order under s. 256 National Land Code ordering in effect that the land be sold by public auction as prayed. It transpired however that, contrary to the requirements of s. 257(1)(b) and (c) respectively, the order had neither fixed the auction date nor stipulated the amount actually due under the charge. In this appeal a question thus arose as to whether the provisions of s. 257(1) were mandatory in nature, and if so, whether the order of Court herein was invalid on account of its non-compliance with the section.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] The provisions of s. 257(1)(a) to (d) of the Code were mandatory. In the circumstances, the order for sale herein, bearing in mind the defects it had suffered from, ought to be invalidated.

[2] In so far as there was conflict of judicial opinion, as to the applicability of the provisions of O. 83 r. 3 Rules of the High Court, 1980, to an application for an order seeking enforcement of a charge registered under the Code, by way of an order for sale, as appeared in *Citi Bank v. Ibrahim bin Othman* on the one hand, and *Perwira Affin Bank Berhad v. Tan tian Ser* on the other, the reasoning and conclusion of the former was to be preferred.

[Appeal allowed. Judgment of Court below set aside.]

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG TANAH:** Gadaian - Perintah untuk penjualan tanah yang digadaikan - Perintah tertinggal untuk menyatakan tarikh perlelongan dan jumlah yang kena dibayar - Ketidak-patuhan s. 257(1)(b) & (c) Kanun Tanah Negara, 1965 - Kesan - Samada perintah menjadi tak sah - Pertimbangan A. 83, k. 3 Kaedah-kaedah Mahkamah Tinggi 1980.*

Pemegang gadaian dalam kes ini telah memohon untuk mendapatkan perintah untuk jualan tanah yang tergadai bagi menjelaskan jumlah yang kena dibayar dan terhutang di bawah gadaian tersebut. Berikutan itu Mahkamah Tinggi telah membuat satu perintah di bawah s. 256 Kanun Tanah Negara yang memerintahkan secara berkesannya bahawa tanah tersebut hendaklah dijual melalui perlelongan awam sepertimana yang dipohon. Walaubagaimanapun, apa yang berlaku ialah, bertentangan dengan kehendak-kehendak s. 257(1)(b) dan (c) masing-masingnya, perintah tersebut telah tidak menetapkan tarikh perlelongan mahupun menentukan jumlah yang sebenarnya kena dibayar di bawah gadaian tersebut. Dalam rayuan ini, satu persoalan telah berbangkit mengenai samada peruntukan-peruntukan s. 257(1) adalah bersifat mandatori, dan jika sedemikian, samada perintah Mahkamah di sini adalah tak sah disebabkan ketidak-patuhan olehnya akan seksyen tersebut.

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Peruntukan-peruntukan s. 257(1)(a) hingga (d) kanun tersebut adalah mandatori. Dalam keadaan yang sedemikian, perintah untuk jualan di sini, memandangkan ketidak-sempurnaan yang telah ianya alami, seharusnya dijadikan tak sah.

[2] Sejauhmana terdapatnya pertelingkahan pendapat, berhubung dengan kepemakaian peruntukan-peruntukan A. 83 k. 3 Kaedah-Kaedah Mahkamah Tinggi, 1980, kepada satu permohonan bagi perintah untuk menguatkuasakan sesuatu gadaian yang telah didaftarkan di bawah Kanun tersebut, melalui perintah jualan, sepertimana yang terdapat dalam *Citi Bank v. Ibrahim bin Othman* pada satu pihak dan *Perwira Affin Bank Berhad v. Tan Tian Ser* di pihak yang lain, alasan dan keputusan kes yang terdahulu adalah lebih diutamakan.

[Rayuan dibenarkan. Penghakiman Mahkamah di bawah diketepikan]

Cases referred to:
Citi Bank v. Ibrahim bin Othman [1994] 1 MLJ 608 ***(aff)***
Perwira Affin Bank Berhad v. Tan Tian Ser [1995] 2 CLJ 133 ***(ovrd)***

Legislation referred to:
National Land Code 1965, s. 257(1)(b), (c)
Rules of the High Court 1980, O. 83, r. 3

For the appellant - Teh Meng Teck; M/s. Cheah Teh & Su
For the respondent - Kharida bte Ramli; M/s. Samat Din & Partners

JUDGMENT

Edgar Joseph Jr. FCJ:

This was an appeal by a chargor against an order of the High Court, Kuala Lumpur enforcing a charge registered under the National Land Code, 1965, ("the Code"). The order was made pursuant to the chargee's application by way of originating summons, wherein the principal reliefs prayed for were that the charged land to be sold by public auction to satisfy the total amount due and owing to the chargee under the charge and for vacant possession thereof.

As it was common ground that the order for sale aforesaid had neither fixed the auction date nor stipulated the amount actually due under the charge as required by s. 257(1)(b) and (c) of the Code, respectively, we invited Counsel on both sides to argue, as a preliminary point of law, the question what were the legal consequences of such non-compliance.

Section 257(1) provides:

257(1) Every order for sale made by the Court under s. 256 shall:

(a) provide for the sale to be by public auction;

(b) require the sale to be held on or as soon as may be after a date specified therein, being a date not less than one month after the date on which the order is made;

c) specify the total amount due to the chargee at the date on which the order is made; and

(d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question.

At the conclusion of the argument, we were unanimously of the opinion, that the provisions of s. 257(1)(a) to (d) were mandatory, and as the order for sale in the present case had suffered from the defects herebefore mentioned, it was thereby invalidated.

We would add, that insofar as there was a conflict of judicial opinion, as to the applicability of the provisions of O. 83 r. 3 of the Rules of the High Court 1980, to an application for an order seeking enforcement of a charge registered under the Code, by way of an order for sale, as appeared from the judgments of Shankar J (as he then was) in *Citi Bank v. Ibrahim bin Othman* [1994]

1 MLJ 608 on the one hand, and Abdul Aziz bin Mohamad J in *Perwira Affin Bank Berhad v. Tan Tian Ser* [1995] 2 CLJ 133 on the other, we preferred the reasoning and conclusion of Shankar J.

In the result, we allowed the appeal with costs, both here and below and set aside the judgment of the High Court. The deposit was ordered to be refunded.

Reported by W.A. Sharif